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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHASOM BROWN, WILLIAM BYATT, JEREMY DAVIS, CHRISTOPHER CASTILLO, and MONIQUE TRUJILLO individually and on behalf of all other similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO EXCLUDE IN PART THE OPINIONS OF GOOGLE'S SURVEY EXPERT ON AMIR

Judge: Hon. Yvonne Gonzalez Rogers
Date: October 13, 2023
Time: 9:00 a.m.
Location: Courtroom 1 – 4th Floor

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PLEASE TAKE NOTICE that on October 13, 2023, at 9:00 a.m., the undersigned will appear before the Honorable Yvonne Gonzalez Rogers of the United States District Court for the Northern District of California to move the Court to exclude in part the opinions offered by Google's survey expert, On Amir. *See* Ex. 1 (April 15, 2022 Expert Report of On Amir, or "Amir Rep."). This Motion is made under Federal Rule of Evidence 702, Civil Local Rule 7, and *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993), and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the concurrently filed declaration of Mark Mao and accompanying exhibits, all matters of which the Court may take judicial notice, other pleadings and papers on file in this action, and other written or oral argument that Plaintiffs may present to the Court.

ISSUE TO BE DECIDED

Whether Professor Amir's three surveys and corresponding opinions should be excluded as irrelevant and/or unreliable under Federal Rule of Evidence 702 and the standards articulated in *Daubert*.

RELIEF REQUESTED

Plaintiffs respectfully ask the Court to exclude Professor Amir's three surveys, which are summarized in Opinions 2-4 of his April 15, 2022 Report (Ex. 1), specifically paragraphs 3-16 and 49-86. Google and Professor Amir should be precluded from relying on these three surveys for any purpose.

Dated: August 24, 2023

By: /s/ *Mark Mao*

I. INTRODUCTION

This Court should exclude certain opinions offered by Professor On Amir, Google's survey expert. Amir's report summarized the results of three surveys he conducted to "evaluate consumer understanding, perceptions, and expectations." Ex. 1 (Amir Rep.) ¶ 2 (the "Amir Surveys"). Relying on those survey results, Amir opines that some "respondents expect that Google receives" information while they are in Incognito mode. *Id.* ¶ 10. At class certification and summary judgment, Google relied on Amir and his surveys for two purposes: (1) to argue that some class members were aware of Google's collection of private browsing data and therefore impliedly consented to that practice, and (2) as extrinsic evidence to support Google's interpretation of the disclosures.

Amir's Surveys and his related opinions should be excluded as irrelevant and/or unreliable, for three reasons.[1] *First*, implied consent is irrelevant to the trial. Having persuaded the Court that implied consent requires *individualized* inquiries (relying on Amir's opinions), Google cannot use his Surveys to support that defense on a *classwide* basis. Implied consent is relevant only if Google asserts that (meritless) defense against Plaintiffs' individual damages claims. But in Google's own words, "determining what class members understood" will "require individualized examinations." Dkt. 659 at 13-15 (Google's class certification opposition). Google cannot use Amir's Surveys in place of the "individualized examinations" that Google insisted on taking.

Second, the Amir Surveys should be excluded because Google may not rely on extrinsic evidence to support its interpretation of the disclosures. This Court has repeatedly made clear that "[i]f you take a position at summary judgment that a term is unambiguous such that the Court can decide it as a matter of law, you will be excluded at trial from offering extrinsic evidence to

[1] Amir also submitted two rebuttal reports where he criticized opinions offered by Plaintiffs' experts Bruce Schneier and Mark Keegan. Those Amir rebuttal reports were submitted on May 15, 2022 and June 30, 2022, and they did not contain any additional survey work by Amir. Plaintiffs are not seeking to exclude Amir's rebuttal opinions, except of course insofar as he intends to rely on his three surveys discussed in this motion. If this motion is granted, Amir should not be allowed to rely on his three surveys either affirmatively or in rebuttal.

interpret that claim." Feb. 14, 2023 Tr. at 39:14-25. Google has taken the position that its disclosures are unambiguous. Dkt. 969 (Order denying Google's MSJ) at 13 n.15. Google therefore may not "rely[] on extrinsic evidence for the proposition that it explicitly disclosed the at-issue data collection." *Id.* Because the Amir Surveys cannot be used by Google to prove implied consent nor the meaning of the disclosures, they should be excluded as "no longer legally relevant to any issues in this case." *Apple Inc. v. Samsung Electronics Co.*, 2012 WL 2571332, at *4 (N.D. Cal. June 30, 2012) (excluding expert survey evidence).

Third, the Amir Surveys should in any case be excluded as irrelevant and unreliable because Amir did not ask the right questions. To meet its burden for consent, Google must identify evidence that Plaintiffs "consent[ed] to the ***specific practice*** alleged in this case." *Campbell v. Facebook Inc.*, 77 F. Supp. 3d 836, 848 (N.D. Cal. 2014) (emphasis added). The "specific practice" challenged is Google's collection of private browsing data during (1) users' visits to ***non-Google*** websites while (2) ***signed out*** of their Google accounts. Yet Amir did not ask about either of these scenarios [redacted]. Ex. 2 at 260:14-18, 261:3-22. To the contrary, Amir used suggestive fact patterns to prime respondents to consider browsing on Google-owned websites, like "online research" (Google Search) and "watching a video" (YouTube). Amir Rep. tbl. 5; *id.* tbl. 10. Accordingly, there is no way to distinguish (i) respondents who were acknowledging that Google may collect Incognito data when people visit Google.com and/or sign in to Google accounts from (ii) any respondents who knew about the specific, at-issue data collection—focused on ***signed-out*** private browsing on ***non***-Google websites. Simply put, Amir's Surveys should be excluded because they are not "sufficiently linked to the facts of this case." *Shalaby v. Irwin Indus. Toll Co.*, 2009 WL 7452756, at *11 (S.D. Cal. July 28, 2009) (excluding expert testimony).

II. LEGAL STANDARD

Expert testimony is admissible only if "(1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of

reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. This means "the proposed expert testimony [must be] relevant to the task at hand," i.e., "logically advance[] a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (*Daubert II*). "The proponent of expert testimony has the burden of proving admissibility . . . ." Dkt. 803 at 2.

III. ARGUMENT

A. Amir's Surveys Are Not Relevant to Any Issue Being Tried.

Google has relied on the Amir Surveys for just two purposes: (1) to argue that some class members impliedly consented, and (2) to support its own interpretation of the disclosures. But for the upcoming trial, Google cannot use the Surveys to litigate those issues because of (a) Google's class certification argument that implied consent is "individualized," and (b) Google's summary judgment argument that its disclosures are unambiguous. The Surveys serve no purpose for this trial.

1. Amir's Surveys Cannot Be Used to Prove Implied Consent.

Having persuaded the Court that implied consent requires *individualized* inquiries, Google cannot assert that defense on a *classwide* basis to defeat the Rule 23(b)(2) classes' claims. At class certification, Google relied on the Amir Surveys to argue that some class members impliedly consented and that identifying those users would require individualized inquiries. *See* Dkt. 659-3 at 4 (citing Amir's Surveys to argue "[t]here is wide variance in internet users' understanding" of private browsing mode). This Court credited those arguments and declined to certify a damages class, reasoning that "the inquiry into implied consent. . . creates individualized issues that defeat predominance." Dkt. 803 at 32. Because there is no place for implied consent in the Rule 23(b)(2) trial, Google's primary reason for introducing the Amir Surveys does not apply.

Nor may Google rely on the Amir Surveys to support an implied consent defense against the Named Plaintiffs and their individual damages claims.[2] As a threshold matter, implied consent is not an available defense to some of Plaintiffs' claims, including the breach of contract claim. *See* Judicial Council of Cal. Civil Jury Instructions 330-38 (2022) (listing defenses for breach of contract and omitting implied consent). After Plaintiffs raised this argument (among others) in their Rule 23(f) petition, Google all but conceded to the Ninth Circuit that implied consent is *not* a defense to breach of contract claims, pivoting to the entirely different doctrine of *waiver*, which Google failed to allege much less prove. *See* Case No. 22-80147 (9th Cir.), Dkt. 3 at 3.

In any event, even assuming that implied consent were an available defense to all claims (which it is not), the Amir Surveys cannot be used to support that defense as to the Named Plaintiffs' individual damages claims. For implied consent, Google has argued that the factfinder must "evaluate [] which of the various sources each individual user" has reviewed—a process that will, according to Google, "require[] *individualized examinations*." Dkt. 659-3 at 13-15 (emphasis added). The Amir Surveys tell the factfinder nothing about the "sources" to which any Plaintiff was exposed, nor reveal whether she "knew about and consented" to Google's conduct. *Id.* at 13. Having successfully argued that "*individualized* examinations" are required, Google must conduct those individualized examinations.

2. Amir's Surveys Cannot Be Used to Support Google's Interpretation of its Disclosures.

Aside from implied consent, Google has relied on the Amir Surveys for just one other purpose: as extrinsic evidence to support its interpretation of the disclosures. In its summary judgment motion, Google argued that the contract claim should be dismissed because "the study conducted by Google's survey expert, On Amir, confirms most users who were shown the

[2] Plaintiffs acknowledge that the Class Certification Order took a contrary position. Plaintiffs respectfully disagree and wish to preserve their right to appeal, including for (but not limited to) the reasons set forth in their Rule 23(f) petition.

documents Plaintiffs claim comprise their contract expected that Google 'does or probably does' receive the data." Dkt. 907-3 at 14.

That argument violates the Court's rule that "[i]f you take a position at summary judgment that a term is unambiguous such that the Court can decide it as a matter of law, you will be excluded at trial from offering extrinsic evidence to interpret that claim." Feb. 14, 2023 Tr. at 39:13-25. Google has argued that it *unambiguously* disclosed its collection and use of private browsing data. *See* May 12, 2023 Tr. at 14:3-11. At the summary judgment hearing, this Court asked Google, "Is there ambiguity in the policy or not?" *Id.* at 13:25-14:1. Counsel for Google responded "No." *Id.* at 2. This Court explained that "I do not let people change their positions at trial. By arguing that, Google is saying that they will not even attempt to offer extrinsic evidence as to the meaning of those terms." *Id.* at 3-7. Counsel responded, "Correct." *Id.* at 8-11. The summary judgment order acknowledged Google's choice:

> Google repeated at the May 12, 2023, hearing that the Privacy Policy was unambiguous and it was therefore not relying on extrinsic evidence for the proposition that it explicitly disclosed the at-issue data collection.

Dkt. 969 at 13 n.15.

Having taken that position (and lost), Google may not use extrinsic evidence (like the Amir Surveys) to support its interpretation of the disclosures. The surveys are therefore irrelevant to the second (and last) issue for which Google has used them.

The Amir Surveys should be excluded because they "would not aid the jury to determine a fact in issue." *Brewer v. Gen. Nutrition Corp.*, 2015 WL 9460198, at *4 (N.D. Cal. Dec. 28, 2015) (Gonzalez Rogers, J.). *Brewer* is instructive. This Court excluded an expert's survey as "not relevant to the liability question on which the [claims] were certified." *Id.* The claims turned on the defendant's "uniform policy" for employee breaks, which confined "the relevant evidence [to the] the policy and the records of missed breaks." *Id.* The same analysis applies here because Google has argued (and this Court has found) that implied consent cannot be adjudicated on a classwide basis, which means that only *express* consent will be tried classwide. Moreover, Google may not rely on extrinsic evidence to support that express consent defense. As in *Brewer*,

Google is limited to the "polic[ies]" themselves, and the Amir Surveys do not "figure into the calculus." *Id.*[3]

Because the Amir Surveys are irrelevant to any issue being tried, exclusion is necessary to ensure the jury is not misled. "In elucidating the 'fit' requirement, the Supreme Court noted that scientific expert testimony carries special dangers to the fact-finding process because it 'can be both powerful and quite misleading because of the difficulty in evaluating it.' Federal judges must therefore exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury." *Daubert II*, 43 F.3d at 1321 n.17 (citing *Daubert*, 509 U.S. at 595). For example, in *Apple v. Samsung*, the court excluded survey evidence that was "no longer legally relevant to any issues in this case," reasoning that to allow the evidence "would be unduly prejudicial and confusing to the jury." 2012 WL 2571332, at *4. The Amir Surveys should be excluded for the same reason. The jury will be tasked with deciding whether Google expressly disclosed its collection and use of private browsing data. Evidence that purports to assess user expectations will distract the jury from their narrow contract interpretation task.

B. Amir's Surveys Did Not Ask About the "Specific Practice" at Issue.

Even if Amir's Surveys are deemed relevant to an issue being tried, they should still be excluded as irrelevant and unreliable because Amir did not ask the right questions. The at-issue data collection is focused on when users "were ***not*** logged into their Google account" and were visiting "a ***non***-Google website." Dkt. 803 at 24 (emphases added). Those limitations are important, and yet Amir ignored them. He asked respondents about Google's receipt of data more generally, including data collected from signed-in users as well as data collected during users' visits to Google websites, like Google.com (Search) and YouTube.com. *See* Amir. Rep. tbl. 5 (vaguely asking whether Google receives information "during an Incognito browsing session" without clarifying that users should focus on signed-out browsing on non-Google websites).

There is no dispute about what Amir did and did not ask. [redacted]

[redacted] Ex. 2 at 258:4-16.

Ex. 2 at 260:14-18; 261:18-22 (emphases added).

As a result, Amir's Surveys are untethered to the "***at-issue*** data." Dkt. 969 at 2 (emphasis added). Consent, whether express or implied, "is not an all-or-nothing proposition. Rather, '[a] party may consent to the interception of only part of a communication or to the interception of only a subset of its communications.'" *In re Google Inc.*, 2013 WL 5423918, at *12 (N.D. Cal. Sept. 26, 2013) (quoting *In re Pharmatrack, Inc.*, 329 F.3d at 9, 19 (1st Cir. 2003)); *see also* Dkt. 969 at 22 (same). As this Court explained in its summary judgment order, "consent is only effective if the person alleging harm consented 'to the ***particular conduct***, or to substantially the same conduct' and if the alleged tortfeasor did not exceed the scope of that consent." Dkt. 969 at 13 (emphasis added) (citing Restatement (Second) of Torts § 892A).

Google must therefore identify evidence that Plaintiffs "consent[ed] to the *specific practice*" being challenged. *Campbell*, 77 F. Supp. 3d at 848. Here, that means evidence which addresses Google's collection and use of private browsing data from (i) users' visits to *non-Google* websites while (ii) *signed out* of their Google accounts. The Amir Surveys at most assess awareness of Google's data collection practices more generally. That approach transforms consent into an "all-or-noting proposition," undermining well-settled law.

Amir's error is compounded by the Incognito Splash Screen's statement that your activity might be visible to "websites you visit." Amir showed the Splash Screen to respondents and yet made no effort to parse Google.com data (a website you can visit) from data collected during visits to *non*-Google websites. There is no way to know whether respondents were

acknowledging that Google collects Google.com data, or whether respondents knew about Google's collection of signed-out private browsing data when users visit non-Google websites.

Worse, Amir primed respondents to consider Google.com data. For example, one survey asked respondents whether Google receives data within an "Incognito mode browsing session (e.g., *watching a video or shopping for a product*)." Amir Rep. tbl. 5 (emphasis added). By referencing two activities commonly performed on Google websites (i.e., YouTube and Google Shopping), Amir called to mind scenarios where users are more likely to expect Google to receive data, thus skewing the results in Google's favor. Similarly, another survey asked participants if they would do "online research" in Incognito, likewise calling to mind Google Search. Amir Rep. tbl. 10. Amir's only other survey did not ask about "Google" at all. *See id.* tbl. 2 (vaguely asking about "companies that provide analytics and advertising services" without mentioning "Google"). The Surveys should be excluded as not "sufficiently linked to the facts of this case." *Shalaby*, 2009 WL 7452756, at *11 (excluding expert testimony).

IV. CONCLUSION

Plaintiffs respectfully ask the Court to exclude Professor Amir's three surveys, which are summarized in Opinions 2-4 of his April 15, 2022 expert report (Ex. 1), specifically paragraphs 3-16 and 49-86. Google and Professor Amir should be precluded from relying on these surveys for any purpose.

Dated: August 24, 2023

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